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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

A. M. ANDERSON, Receiver of National Bank of Kentucky, Louisville, Kentucky,

Petitioner,

v.

IRVIN YUNGKAU, Executor of the Estate of Albert Yungkau, Deceased; H. E. FRANZ, Executor of the Estate of William R. Gilpin, Deceased; LUCY LOGAN MASSIE, Executrix of the Estate of William K. Massie, Deceased; BEN WILLIAMSON, JR. and DAVIS GEIGER, Co-Executors of the Estate of Ben Williamson, Deceased; WATT M. PRICHARD and CHARLES V. KITCHEN, Co-Executors of the Estate of James H. Kitchen, Deceased; CATHERINE C. KITCHEN, Executrix of the Estate of John W. Kitchen, Deceased; HENRY G. SANDIFER, Executor of the Estate of Alexander B. Massey, Deceased,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF FOR PETITIONER

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:—

A. M. Anderson, Receiver of the National Bank of Kentucky, pursuant to the direction and with the approval of the Comptroller of the Currency of the United States, prays that a writ of certiorari issue to review the judg-

ment and order entered January 28, 1946 denying Petitioner's motion for revivor and ordering that the Bill of Complaint of Petitioner against the Respondents be finally dismissed.

SUMMARY STATEMENT

This case presents an important question of Federal Law and Practice which has not been, but should be settled, by this Court [Rule 38(b)]. It involves the interpretation and reconciliation of Rule 25(a) and Rule 6(b) of the Federal Rules of Civil Procedure. No question of fact is involved. The entire Record is covered by a short stipulation.

Seven cases are directly presented. The question in each case is the same and the cases are consolidated for convenience. The cases all stem from the Bill of Complaint filed by the Petitioner in the Eastern District of Kentucky, to recover the stock assessment for which Respondents (then living—since deceased) were held liable by this Court in *Anderson* v. *Abbott* (1944), 321 U. S. 349. However, identical actions were filed by the Petitioner in other circuits and similar questions to those involved here exist in other cases. The determination of such questions in other actions await the outcome of the present suits which are test or type cases.

The sole issue in each case is whether the District Court has power to revive an action against a deceased defendant after the two year period provided in Rule 25(a), upon motion of Petitioner, filed under Rule 6(b) and affirmative and satisfactory proof that failure to revive within two years was due to "excusable neglect." The Court below held that Rule 25(a) was mandatory and that the Court was without any discretion to enlarge the two year limitation, notwithstanding the specific provisions of Rule 6(b) permitting "the act to be done after the expiration of the

specified period when the failure to act was the result of excusable neglect."

The agreed facts may be simply stated. The defendants were living when the action was brought in the District Court and were served with process.

During the pendency of *Anderson* v. *Abbott*, 321 U. S. 349, in the Western District of Kentucky, the cases in the Eastern District and all other Districts in the United States were stayed by agreement—with the understanding that they would be governed by the decision of this Court in the *Abbott* case. In the interim the defendants herein died and Respondents were appointed to administer their estates. The Petitioner, through no lack of diligence, did not learn of defendants' death until more than two years thereafter. Promptly upon learning of defendant's death, and before the estate had been closed, Petitioner moved to revive the case against defendant's Executor or Administrator. This motion was supported by adequate proof under Rule 6(b) to warrant the granting of the motion, if the Court had power to exercise discretion. However, the Court held it was barred from the exercise of any discretion under Rule 25(a), denied Petitioner's motion and dismissed the Bill of Complaint.

The "Stipulation" in the case against Ben Williamson, Jr. and Davis Geiger, Co-Executors of the Estate of Ben Williamson, Deceased (R. 11), is typical of similar stipulations in the cases against Yungkau (R. 57), Franz (R. 7), Massie (R. 17), Massey (R. 9) and Kitchen (R. 13-15).

Suit was filed February 18, 1936 (R. 11). The allegations were "identical" to the allegations in the suit filed in the Western District, decided "in favor of the Receiver in the case of *Anderson* v. *Abbott*, 321 U. S. 349" (R. 2). Ben Williamson died June 23, 1941 (R. 12). His will was probated July 28, 1941, and "*his estate is still open and undistributed*" (R. 12). *Petitioner did not know of his death*

"until August 10, 1944, after the two year period fixed by Rule 25 had expired" (R. 12).

Petitioner had *actions pending* against "approximately *5000 defendants*" (R. 12). There were 6000 shareholders of Banco-Kentucky Company living in all parts of the United States and abroad. Their addresses changed. The Receiver's staff was necessarily limited and it was "impracticable" and *"in fact impossible"* to learn of the residences, movements and even *the death of defendants."* "Without such knowledge he could not bring actions for revivor until after he learned of the death" (R. 12).

It was further agreed that the petitioner *"has been diligent in the performance of his duty."*

Upon the above agreed facts the Court is asked to determine whether the District Court was correct in deciding that it was powerless under Rule 6(b) to relieve against the "miscarriage of justice," which results from the claimed inability to extend the two year "period" of Rule 25(a).

OPINION BELOW

The District Court for the Eastern District filed no opinion. He relied upon his former opinion in *Anderson* v. *Brady*, 1 F. R. D. 589. The opinion of the Sixth Circuit Court of Appeals affirming the judgment of the District Court (R. 26) and the dissenting opinion of Judge Simons (R. 31) are not yet reported. The order of affirmance was entered January 28, 1946 (R. 26).

JURISDICTION

Jurisdiction is conferred on this Court to review this cause by writ of certiorari by Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (U. S. C., Title 28, Sec. 347).

THE QUESTION PRESENTED

The legal question presented is whether the period of two years specified for revivor in Rule 25(a) is absolutely final regardless of the circumstances or whether the Court has power under Rule 6(b) to permit Revivor after the specified period, "when the failure to act" (within the period) was the "result of excusable neglect."

In other words, does Rule 6(b) mean what it plainly states: "when by these Rules . . . an act is required . . . to be done within a specified time, the Court *for cause shown* may, at any time in its discretion . . . (2) upon motion *permit the act to be done after the expiration of the specified period when the failure to act was the result of excusable neglect,*" or was the Court below correct in reading into the Rule a *third* exception in addition to the only two specific exceptions permitted by the Rule? This Court has never passed on this question.

REASONS RELIED ON FOR WRIT OF CERTIORARI

The decision of the Court below is without precedent. It decides an important question of Federal Law and Practice which has not been, but should be, decided by this Court. The question involves the proper interpretation of the Federal Rules of Civil Procedure and the reconciliation of a conflict between two Rules.

The question involved is not only of importance in the seven cases herein presented but will arise in similar cases pending in other circuits. Further, the question of the Right to Revive after the two year period specified in Rule 25(a) when *good cause is shown for failure to act within the period* is a general question which is involved in numerous cases in the Federal Courts and can only be settled by the authoritative decision of this Court. The question is therefore of broad general interest.

The decision below is contrary to the modern view that Courts should have the power, upon proper showing, to relieve against hardship and to prevent a miscarriage of justice. Rule 6(b) was obviously intended to accomplish this advance in modern procedure over the antiquated and harsh rules of former days. Rule 6(b) was intended to vest power in the District Court to extend the specific period for an act where, as here, it is established that it was "*in fact impossible*" to act within the period required by other Rules.

It is also apparent that the interpretation of Rule 6(b) by the Sixth Circuit is at variance with the interpretation of that rule in its present form by the Advisory Committee on Rules for Civil Procedure of this Court. There is also a conflict between circuits relative to the application of Rule 6(b) on the time for filing a record on appeal fixed by Rule 73(g). *Ainsworth* v. *Gill Glass & Fixture Co.* (C. C. A. 3), 104 F. (2d) 83, holds that Rule 6(b) can be invoked to extend the time. *Burke* v. *Canfield, et al.* (C. C. A., D. C.), 111 Fed. Rep. (2d) 526 and *Mutual Benefit Health & Accident Ass'n* v. *Snyder* (C. C. A. 6), 109 F. (2d) 469, hold directly contra.

SPECIFICATIONS OF ERROR

1. The Circuit Court of Appeals erred in affirming the decision of the District Court.

2. The Circuit Court of Appeals erred in holding that the District Court had no discretion to extend the time for Revivor, notwithstanding "good cause" and "excusable neglect" were proved under Rule 6(b).

ARGUMENT

("Opinion Below," "Jurisdiction" and "Statement of the Case" Are Set Forth in the Petition.)

It would seem that this is peculiarly a case for the exercise of this Court's power of supervision and review. It

involves a conflict between the Rules of Federal Procedure which has been resolved differently by inferior courts. This Court alone can settle the question and reconcile the conflict.

The question is one of general interest and concern. It is not only involved in a number of cases in the Banco litigation, pending in different circuits, but is common to all classes of action involving individual parties. Further, the question is presented on a clear cut and agreed record so that it can be determined free from the complication of any controversial facts.

While it is not appropriate at this posture of the case to argue the merits, it may not be amiss to point out that decision of the majority in the Court below does violence to the plain language and intent of Rule 6(b) and is contrary to the interpretation of the Rule by this Court's Advisory Committee on the Rules.

Rule 6(b) plainly provides—

> "When by these rules . . . an act is required . . . to be done at or within a specified time, the court for *cause shown* may, at any time in *its discretion* . . . (2) upon motion permit the act to be done *after the expiration of the specified period* where the failure to act was the result of *excusable* neglect; *but it may not* enlarge the period for taking any action under Rule 59, except as stated in subdivision (c) thereof, or the *period for taking an appeal* as provided by law."

There are no other exceptions. Neither of these exceptions is involved here. The Court below was without authority to alter the Rules or add a third exception with respect to Rule 25(a). Any change in Rule 6(b) must be made by this Court which alone has power to change the rule or increase the number of exceptions thereto. This is recognized in the "Second Preliminary Draft of Proposed Amendments to Rules of Civil Procedure for the District

Courts of the United States" prepared by the Advisory Committee on Rules for Civil Procedure (May, 1945). The learned committee does propose a change in Rule 6(b) so as to add several additional exceptions including 25(a). However, the committee is careful to state "This draft has not been approved by the Supreme Court . . . the Court . . . has not given it consideration (May 15, 1945)".

"Substitution of Parties" or Revivor after Death under Rule 25(a) is clearly "an act" "required to be done at or within a specified time" "by these rules." Therefore, the Court for "cause shown" has "discretion" to permit the substitution of Parties after the two year period upon proof of "excusable" neglect under Rule 6(b).

This Court's Advisory Committee on Rules for Civil Procedure has expressed its view that Rule 6(b) contains only two exceptions as follows:—

> "Rule 6(b) is a rule of general application giving wide discretion to the court to enlarge these time limits or revive them after they have expired, *the only exceptions* stated in the rule being a prohibition against enlarging the time specified in Rule 59(b) to (d) for making motions for or granting new trials and a prohibition against enlarging the time fixed by law for taking an appeal." (Italics added).[1]
>
> *"Some of the present rules which contain time limits which may be set aside under Rule 6(b) are Rule 25 allowing substitution of parties, in case of death within two years, . . ."*

To the same effect see Address of Dean Charles E. Clark [Federal Rules of Civil Procedure and Proceedings to the American Bar Association Institute at Cleveland (1938) at p. 210].

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[1] Second Preliminary Draft of Proposed Amendments Note, p. 2.

The reason given below for making Rule 25a an additional exception was the requirement of the rule that if the act of substitution was not done in two years the action "*shall*" be dismissed. However, the word "shall" when used with reference to courts or governmental action is not always absolute and imperative. See *Escoe* v. *Zerbst, Warden,* 295 U. S. 490; *Railroad Company* v. *Hecht,* 95 U. S. 168; *West Wisconsin Railway Co.* v. *Foley,* 94 U. S. 100; *Richbourg Motor Co.* v. *United States,* 281 U. S. 528, 534; *Munro* v. *State,* 223 N. Y. 208; *Swift* v. *Registrars,* 281 Mass. 271.

Various acts required to be done by the rules within specified periods carry mandatory consequences if not done on time. However, this mandatory language must be read in connection with the rules as a whole. When so read it is clear that Rule 6(b) was intended to relieve against the injustice and the hardship of an unyielding application of the executioner's knife when compliance with the time limit was "impossible" and "cause" and "excusable neglect" are established.

This interpretation is in accordance with the intent of the new Rules to liberalize procedure, mitigate the harshness of the old rules and to prevent a miscarriage of justice. The interpretation of the District Court would prevent revivor after two years under any circumstances, including cases where the fact of death was concealed from the opposite party until the "period" provided by Rule 25(a) had expired. Other illustrations of the necessity for applying Rule 6(b) are cases where due to service in the Armed Forces during the War, death is not known or reported until after the two year period of Rule 25(a) has expired.

The conflict between circuits as to whether the time limit of forty days to file record on appeal under Rule 73(g) may

be extended in accordance with Rule 6(b) did not reach this court because in all three of the cases the court exercised its "discretion" under Paragraph (a) of Rule 73[2] to retain jurisdiction of the appeal, notwithstanding failure to file the record on time.

Nor could the question reach this Court in *Winkelman* v. *General Motors Corp.*, 30 Fed. Supp. 112, or in *Anderson* v. *Brady*, 1 F. R. D. 589, because in neither case was there a finding of "excusable neglect" which is a prerequisite for the exercise of this Court's discretion under Rule 6(b).

CONCLUSION

This Court has not heretofore had the question at bar directly presented and we respectfully pray that the Petition for a writ of certiorari be granted.

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[2] *Ainsworth* v. *Gill Glass & Fixture Co.* (C. C. A. 3), 104 F. (2d) 83; *Burke* v. *Canfield* (C. C. A., D. C.), 111 Fed. (2d) 526; *Mutual Benefit Health & Accident Assn.* v. *Snyder* (C. C. A. 6), 109 Fed. (2d) 469.